Filed 10/27/09 P. v. Cruz CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JORGE ALBERTO CRUZ, Defendant and Appellant.	A124231 (Contra Costa County Super. Ct. No. 08-0594-5)

Jorge Alberto Cruz (appellant) appeals from the trial court's order modifying his probation. Appellant's counsel filed an opening brief setting forth the facts of the case and requesting this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant's counsel informed appellant of his right to file a supplemental brief but appellant did not file such a brief. After reviewing the record, we requested, and the parties filed, supplemental briefing on the issue of whether the court had the authority to modify probation. Having reviewed the supplemental briefs, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

On May 28, 2008, an information was filed charging appellant with committing the following offenses against John Doe on March 2, 2007: (1) a lewd and lascivious act with a child under the age of 14 years (Pen. Code,[1] § 288, subd. (a), count 1); and (2) sodomy of a child under the age of 14 years and 10 years younger than appellant

[1] All statutory references are to the Penal Code unless otherwise stated.

(§ 286, subd. (c)(1), count 2.) According to the probation report, when appellant's 12-year-old stepson (the victim) delayed in cleaning his room, appellant told him to "pull his pants down" and the victim, "being afraid of [appellant], complied." Appellant approached the victim from behind and "inserted his penis into the victim's anus." The victim's mother entered the room shortly thereafter and asked what was going on. Appellant denied anything had occurred and the victim, "again fearing [appellant][,] agreed . . . nothing had occurred." The victim's mother "did not believe them and began to batter [appellant] while she called for her other children, who were also in the home at the time, to call the police."

On October 27, 2008, the prosecutor stated the parties had reached an agreement in which appellant, "in exchange for a plea to . . . section 288(a) [count 1]," "will be put on three years of formal probation, . . . sentenced to one year in the county jail, . . . waive the 90 days credit that he currently has, . . . carry all the standard terms and conditions of probation, and . . . receive six years state prison suspended . . . ." The court acknowledged "those are the basic terms" and noted appellant would be obligated to register as a sex offender and pay various fines. Appellant waived his constitutional rights and pled no contest to count 1. He signed a waiver and plea form in which he acknowledged, among other things, "I understand that the Court will impose conditions upon my probation. These conditions may include up to one year in . . . jail, a fine of up to $10,000, and other conditions that are reasonably related to the charge(s) to which I am pleading guilty/no contest," and "I understand that conviction of the charge(s) will require me to pay appropriate restitution to the victim(s) of my crimes . . . ." The court found there was a factual basis for the plea and found appellant guilty as charged on count 1.

On December 5, 2008, in accordance with the negotiated disposition, the court dismissed count 2, suspended execution of a six year prison term on count 1, and placed appellant on probation for three years. The court stated that appellant would be required, as conditions of his probation, to serve one year in county jail, waive 90 days of credit for time served, pay "standard fines," register as a sex offender, and provide a DNA

specimen and blood sample. The prosecutor added, "I'm supposed to make sure he understands that the . . . registration is for life and that he may also be subject to residency restrictions and GPS monitoring." Appellant stated he understood those conditions. Appellant signed a felony order of probation acknowledging he had also agreed to "standard terms," including the conditions that he "obey all laws and follow all orders of the Court," not leave the state without permission or change his place of residence without the probation officer's approval, "follow all orders of the Probation Officer and report as directed," and not possess any firearms.

On January 21, 2009, the probation department filed a report and recommendation for modification to add "sex offender special probation conditions" on the ground that the conditions "are crucial to appropriately supervise the defendant, thereby protecting the community, and to aid his rehabilitation." At a hearing on February 6, 2009, appellant objected to the imposition of additional conditions. Noting it would "seriously consider a request . . . to allow [appellant] to withdraw his guilty plea" if he feels the new conditions "are so burdensome that [he] cannot abide by the terms," the court stated the additional conditions it was considering imposing were: (1) submit to search and seizure of his person and place of residence; (2) consent to a sex offender evaluation; (3) consent to and cooperate with [the use of] sex offender assessment instruments limited to a polygraph when deemed necessary by treatment providers and the probation officer; (4) be financially responsible for all counseling costs incurred by the victim; (5) consent to the sharing of privileged assessment and treatment information between agencies and individuals "deemed essential in assessing, monitoring and mediating treatment for sexual deviancy problems"; (6) not possess any child pornography; (7) complete a sexual offender treatment program; (8) consent to and cooperate with any plan deemed necessary by treatment providers and/or the probation officer to maintain offense-free behavior; (9) obtain approval before moving to a new residence and not move "within 200 yards of any school, playground or other facility frequented primarily by children"; and (10) not reside with any other convicted sex offender.

After reciting the above conditions, the court stated, "Mr. Cruz, why don't you talk with your attorney because in a minute or two I'm going to ask you if you accept these additional conditions." There was "[a] pause in the proceedings," and appellant's attorney stated, "We're fine, Judge." The court asked, "Then, Mr. Cruz, these are the additional terms of probation. Do you understand them, sir?" Appellant responded, "Yes, sir." The court asked, "And do you accept them, sir?" Appellant responded, "Yes." The court stated, "Then I impose these additional terms." Appellant's attorney stated she wished to state for the record that she had objected to the additional terms on the ground that the court "cannot modify his terms of probation" without "changed circumstances." The court stated, "I view some of these conditions as mandatory, and further I view the remaining conditions as being necessary for Mr. Cruz's successful completion of probation." The prosecutor stated the court was prepared to allow appellant to withdraw his plea but appellant "has not indicated that [he wishes to withdraw his plea]. He's indicated that he's willing to accept those conditions." The court stated, "And Mr. Cruz has already stated that." The hearing ended with the court noting, "Both Counsel have stated their respective positions as they must, I considered them and these additional conditions have now been imposed."

On July 17, 2009, after reviewing the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, we issued a request for supplemental briefing on the following issue: "Did the trial court have authority to modify appellant's probation to include additional conditions of probation? In answering this question, please address: [¶] (1) whether there must be changed circumstances before a trial court can modify probation to include additional conditions, [¶] (2) the difference, if any, between the trial court's authority to impose mandatory conditions of probation and non-mandatory conditions of probation (see e.g., *People v. Cates* (2009) 170 Cal.App.4th 545; Pen. Code, § 1203.067, subd. (b)); [¶] (3) if there is a difference between the trial court's authority to impose mandatory conditions of probation and non-mandatory conditions of probation, which additional probation conditions imposed in this case were mandatory and which were non-mandatory; and [¶] (4) whether appellant consented to the imposition of any or all of the

additional conditions of probation. Appellant filed a supplemental brief on August 3, 2009. Respondent filed a supplemental brief on September 1, 2009. Appellant did not file a reply brief.

DISCUSSION

"When a guilty [or no contest] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) Although a plea agreement does not divest the court of its inherent sentencing discretion, "a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. [Citation.] . . . Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. [Citation.] Once the court has accepted the terms of the negotiated plea, '[i]t lacks jurisdiction to alter the terms of a plea bargain . . . unless, of course, the parties agree.' [Citation.]" (*People v. Ames* (1989) 213 Cal.App.3d 1214, 1217.) The court also lacks jurisdiction to modify the terms of probation after sentencing unless there has been a change of circumstances, such as new facts that were not known at the time of sentencing. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095.)

However, "[t]his does not mean that *any* deviation from the terms of the agreement is constitutionally impermissible." (*People v. Walker*, *supra*, 54 Cal.3d at p. 1024.) "A punishment or related condition that is insignificant relative to the whole, such as a standard condition of probation, may be imposed whether or not it was part of the express negotiations." (*Ibid*.) A condition of probation that is mandatory may also be imposed at any time. (See *People v. Cates* (2009) 170 Cal.App.4th 545, 552 (*Cates*).) In *Cates*, *supra*, the defendant was placed on probation after pleading no contest to a felonious assault on his former girlfriend. The trial court later modified probation to require appellant to complete a 52-week batterer's counseling program even though he was performing satisfactorily on probation. (*Id*. at pp. 547, 552.) *Cates* held modification was proper because section 1203.097 provides that a person who is granted probation after having been convicted of certain crimes, including the one of which the

defendant was convicted, "shall" be required to complete "a batterer's program . . . for a period not less than one year," and the court's failure to impose that mandatory condition created a legally unauthorized sentence that could be corrected at any time. (*Id.* at p. 549, 552.)

Here, imposition of some of the additional conditions of probation was proper on the ground that they were mandatory conditions of probation. Section 1203.067, subdivision (a), provides that before probation is granted to a person convicted of violating section 288, the court "shall do all of the following," including "[o]rder[ing] the defendant evaluated . . . ." Section 1203.067, subdivision (b), provides that where a defendant convicted of violating section 288 is granted probation, "the court shall order the defendant to be placed in an appropriate treatment program designed to deal with child molestation or sexual offenders, if an appropriate program is available in the county." Section 1203.1g provides that "[i]n any case in which a defendant is convicted of sexual assault on a minor, and the defendant is eligible for probation, the court, as a condition of probation, shall order him or her to make restitution for the costs of medical or psychological treatment incurred by the victim as a result of the assault . . . ." The additional conditions that appellant consent to a sex offender evaluation, complete sex offender treatment, and be financially responsible for the victim's counseling costs[2] were all mandatory conditions of probation that could be imposed at any time. (See *Cates*, *supra*, 170 Cal.App.4th at p. 552; §§ 1203.067, 1203.1g.)

Appellant argues in his supplemental brief that the use of the term "shall" in section 1203.067, subdivision (b), does not necessarily show that sex offender treatment is a mandatory condition of probation. He states the Legislature "clearly contemplated that some offenders . . . would not be placed in a treatment program if no such program was available in the county" and that the word "appropriate" in the phrase "appropriate

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[2] The condition that appellant be financially responsible for the victim's counseling costs was proper for the additional reason that appellant acknowledged in his waiver and plea form that he would be required "to pay appropriate restitution to the victim(s) of my crimes . . . ."

treatment program" suggests the court has discretion "to chose whether or not to order treatment . . . ." The plain language of the statute, however, requires the court to impose the condition where an appropriate treatment program is available in the county. There is nothing in the record indicating an appropriate treatment program was not available in Contra Costa County.

Imposition of the remaining conditions of probation was proper because they were already encompassed by the parties' plea negotiations. As noted, the plea agreement required appellant to "carry all the standard terms and conditions of probation" and "be subject to residency restrictions," and appellant had acknowledged in his waiver and plea form that "other conditions that are reasonably related to the charge(s) to which [he was] pleading" may also be imposed. The condition prohibiting appellant from possessing child pornography was included in a standard condition that required him to "obey all laws" because it is a violation of the law to possess child pornography. (§ 311.11.) The search and seizure condition was reasonably related to the standard probation requirement that appellant "obey all laws." (See *People v. Balestra* (1999) 76 Cal.App.4th 57, 67-68 [because a search condition is intended to ensure that the probationer is obeying the fundamental condition of all grants of probation that he obey all laws and serves a valid rehabilitative purpose, "it is of no moment whether the underlying offense is reasonably related to theft, narcotics, or firearms"].) In addition, the condition requiring appellant to obtain approval before moving to a new residence was a standard condition of probation that was set forth in the felony order of probation that he signed. The other conditions relating to his place of residence were contemplated at the original sentencing hearing at which appellant stated he understood he "may also be subject to residency restrictions and GPS monitoring" and were also reasonably related to the crime of which he was convicted. Finally, the conditions requiring appellant to consent to a sex offender assessment treatment instrument (a polygraph), to the sharing of privileged information for treatment purposes, and to any plan deemed necessary by treatment providers and/or the probation officer to maintain offense-free

behavior, were reasonably related to the crime of which he was convicted, and to the mandatory conditions of probation relating to sex offender evaluation and treatment.

Because all of the additional conditions were mandatory, standard, encompassed by the original plea agreement and/or reasonably related to the crime of which appellant was convicted, the trial court had the authority to impose them absent a change in circumstances.

DISPOSITION

The order modifying probation is affirmed.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.